



## U. S. Chemical Safety and Hazard Investigation Board

### Memorandum

To: The CSB Board

From: Christopher Warner, General Counsel  
Paul-Noel Chretien, Deputy General Counsel  
Raymond Porfiri, Attorney-Advisor

Subject: Board Governance Issues

Date: August 30, 1999

### **I. Introduction**

You have asked the Office of General Counsel to examine the relationship between the powers of the Chairperson of the U.S. Chemical Safety and Hazard Investigation Board (CSB) and those of the CSB Board as a whole. Specifically, you asked us three major questions:

- 1) What are the functions and responsibilities of the Chairperson?
- 2) What are the functions and responsibilities of the Board as a whole?
- 3) What are the functions and responsibilities of individual Board Members?

We have examined the CSB's enabling statute and associated legislative history, and other applicable legal authorities.<sup>1</sup> In brief, the statute places day-to-day administration of the Board in the Chairperson's hands, while conferring on the Board as a whole responsibility for certain core functions of the agency that are outlined in its statute, 42 U.S.C. § 7412(r)(6).

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<sup>1</sup> We have also consulted with Professor of Law Gary J. Edles, former General Counsel to the Administrative Conference of the United States (the government's former advisory body on matters of administrative law and process), and one of the country's pre-eminent experts on governance issues at multi-member federal agencies. In addition to providing us with legal precedents pertinent to the questions posed by the Board, Professor Edles has reviewed and agrees with the analysis and conclusions contained in this memorandum.

There are some clear lines between the Chairperson's role as the Board's chief administrative and executive officer and the collective statutory responsibilities of the Board Members. In certain areas, however, the Chairperson and the Board will need to agree upon their precise roles. In drawing appropriate lines, both the Chairperson and the other Board Members have responsibilities toward each other. In the exercise of his functions, the Chairperson is subject to the full Board's general policies and directives. On the other hand, the full Board is not entitled to use its powers to intrude into areas belonging exclusively to the Chairperson. Where disputes arise as to which matters are administrative or executive concerns of the Chairperson and which are substantive matters for the Board as a whole, the Board as a whole has the final say, as long as its views are reasonable. In the absence of Board policy on a specific issue, the Chairperson necessarily possesses substantial discretion to act on his own.

The Chairperson and the Board Members should work cooperatively to design a set of rules that do not compromise the statutory functions of either the Chairperson or the Board Members and that permit the Board to fulfill its fundamental substantive responsibilities while ensuring that the Chairperson is able to administer the Board's operations efficiently. This memorandum is designed to facilitate that process. In Section II, we provide historical background information on multi-member boards and explain the general legal principles relevant to board governance issues. In Section III, we provide a detailed analysis of the CSB's enabling statute. In Section IV, we analyze a number of specific management and governance areas in order to clarify the respective roles of the Chairperson and the Board as a whole. In Section V, we offer some concluding thoughts. We have enclosed three attachments: the CSB's enabling statute, the Senate Committee Report on the CSB's enabling legislation, and a memorandum concerning quorum requirements.

## **II. General Legal Principles on Board Governance**

## A. Purpose of Multi-Member Boards

The multi-member boards and commissions of the U.S. Government, which are the prototype independent agencies, bring together individuals of diverse views, expertise, and backgrounds to tackle legally difficult, technically complex, and often politically sensitive issues.<sup>2</sup> In traditional theory, their stock-in-trade is the expert, collegial, non-political (or at least bipartisan) resolution of these issues. Most – like the Federal Trade Commission, the Federal Communications Commission, or the Nuclear Regulatory Commission – are regulatory, *i.e.*, they possess quasi-legislative, executive, and quasi-judicial powers.<sup>3</sup> Some, like the Chemical Safety Board, are entirely or largely advisory.<sup>4</sup>

## B. Historical Underpinnings

Boards and Commissions are creatures of statute and get their authority entirely from their statutes. They have no inherent authority. Such statutes create the entity, assign it its mission, establish its organization and division of internal responsibilities, and give it its powers.<sup>5</sup> The extent of those powers is determined by considering the power Congress granted it in light of the statutory language and background.<sup>6</sup>

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<sup>2</sup> Most multi-member agencies are called “boards” or “commissions.” But Congress has also used other terms (e.g., Federal Labor Relations Authority, Farm Credit Administration, Federal Deposit Insurance Corporation). The differences in the name are generally descriptive and have no bearing on the board’s or commission’s authority.

<sup>3</sup> Regulatory agencies can issue regulations, take administrative action to enforce their statutes and regulations, and decide cases through administrative adjudication.

<sup>4</sup> Other examples of advisory, or partially advisory, agencies are the Defense Nuclear Facilities Safety Board (DNFSB), the National Transportation Safety Board (NTSB), and the Postal Rate Commission (PRC). The DNFSB reviews the design of defense nuclear facilities run by the Department of Energy (DOE), makes recommendations to DOE regarding the safety of these facilities, and investigates events or practices at these facilities that may affect public health or safety. The NTSB investigates civil aviation accidents and significant accidents in other modes of transportation and makes recommendations to the Federal Aviation Administration (FAA) and other bodies. The NTSB also has regulatory responsibility for the administrative trial and appellate review of FAA and Coast Guard decisions assessing civil penalties or affecting the certificates of pilots, mariners, or mechanics. The PRC is an adjudicatory agency that issues formal recommendations regarding changes that the Postal Service proposes regarding postal rates, fees, and mail classification.

<sup>5</sup> In oft-quoted language, the Supreme Court has commented that “the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.” *CAB v. Delta Air Lines*, 367 U.S. 316, 322 (1961).

<sup>6</sup> See *Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 965 (D.C. Cir. 1985), quoting *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

A brief history of the development of multi-member agency organizational structure helps place the questions posed by the Board Members in context. The first multi-member agency was the Interstate Commerce Commission, created in 1887.<sup>7</sup> Congress gave the Commission as an institution all substantive and organizational powers, including the power to appoint officers and employees,<sup>8</sup> establish procedures “as will best conduce to the proper dispatch of business and to the ends of justice,”<sup>9</sup> lease offices, and purchase supplies.<sup>10</sup> There was no provision outlining any particular powers of the Chairman. Indeed, the Chairman was referred to only once in the statute – *i.e.*, expenses were to be paid upon the presentation of itemized vouchers approved by the Chairman. Other multi-member agencies were modeled on the structure of the ICC.<sup>11</sup>

Over time, Congress and the President came to recognize that the day-to-day management of multi-member agencies could not be exercised collectively in an efficient manner; such institutions needed some centralized administration. In 1949, the U.S. Commission on Organization of the Executive Branch (the “Hoover Commission”) recommended that all administrative responsibility at multi-member agencies be vested in the chairman of the agency.<sup>12</sup> During the 1950s and 1960s, Presidents Truman and Kennedy, responding to that recommendation, presented several Reorganization Plans to Congress designed to transfer from the agency as a whole to its chairman the power of day-to-day administration.<sup>13</sup> Since then, even non-chairmen members of multi-member agencies have come to accept the necessity of some centralized administration.<sup>14</sup>

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<sup>7</sup> 24 Stat. 379 (1887).

<sup>8</sup> See 25 Stat. 861-62 (1889).

<sup>9</sup> 25 Stat. 861 (1889).

<sup>10</sup> 25 Stat. 862 (1889).

<sup>11</sup> The original Act to Regulate Commerce in 1887 technically placed the ICC within the Department of the Interior and required approval of vouchers by the Secretary of the Interior as well as the ICC Chairman. 24 Stat. 386 (1887). But the Interior Secretary’s role was eliminated in 1889 and the ICC became a freestanding agency. 25 Stat. 862 (1889). For much of its history, the Commission itself selected its own chairman from among the members. From 1910 until 1937, the chairmanship simply rotated among the members based on seniority. The Reorganization Plan of 1969, 83 Stat. 859 (1969), authorized the President to select the ICC Chairman, and transferred administrative responsibility to the Chairman.

<sup>12</sup> Recommendation No. 1, Report to the Congress on Regulatory Commissions 5 (1949).

<sup>13</sup> See, e.g., Reorganization Plan No. 9 of 1950, 64 Stat. 1265 (1950) (Federal Power Commission).

<sup>14</sup> See David M. Welborn, *Governance of Federal Regulatory Agencies*, 36-38 (Univ. of Tennessee Press 1977). The Welborn book is a revision of a study of seven multi-member agencies prepared under the auspices of the Administrative Conference of the United States. Although it examines only agencies with regulatory functions, we believe it has relevance to all multi-member agencies. It attempts to analyze the “inner life” of multi-member

### C. Overall Congressional Intent

There are approximately 30 federal multi-member agencies.<sup>15</sup> All of the Reorganization Plans fundamentally assign substantive authority to the board or commission as a whole and administrative authority to the chairman. But each statute uses its own specific language that can create slightly different demarcations of responsibility. Frequently, Congress simply copies from one statute to another or amalgamates portions of more than one statute into the new statute. Statutory language is often general, and even relatively detailed statutes rarely spell out all the fine points of the agency's organization and operation.

The typical Reorganization Plan of the 1950s and 60s contained the following language:

There are hereby transferred from the . . . Commission . . . to the Chairman of the Commission . . . the *executive* and *administrative* functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditures of funds.<sup>16</sup> (Emphasis added).

Use of the term “including” before the specific enumeration of the trilogy of conventional executive or administrative functions suggests that Congress generally considered appointment and supervision of staff, the distribution of the agency's work, and the use and expenditure of funds to be executive or administrative functions belonging to the chairman. But a chairman's powers in this regard were not unfettered. The typical Reorganization Plan simultaneously limited the Chairman's executive and administrative powers in four key respects:

- (1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

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agencies and addresses the relationship between institutional characteristics and substantive results. Chapter three is a survey of the relationship between the chairman and his colleagues in the management of the agency. We refer to this work from now on simply as “Welborn.”

<sup>15</sup> We include within this category only those agencies with one or more presidential appointees who can only be removed for cause. There are other multi-member bodies that do not meet this criteria.

<sup>16</sup> See, e.g., Reorganization Plan No. 8 of 1950, 64 Stat.1264 (1950) (concerning the Federal Trade Commission).

- (2) The appointments by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.
- (3) Personnel employed regularly and full time in the immediate offices of members of the Commission other than the Chairman shall not be affected by the provisions of this Reorganization Plan.
- (4) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.<sup>17</sup>

In short, Congress sought to place day-to-day direction and internal administration of the multi-member boards and commissions in the chairman's hands in order to prevent what one observer described as "splintered management."<sup>18</sup> However, Congress did not believe that "administrative" or "executive" power should be read so broadly as to embrace the operations of other members' offices. In addition, Congress did not accord agency chairmen absolute administrative and executive authority. Rather, it required that, in exercising his administrative powers, the chairman do so in accordance with the overall policy direction enunciated by the full board or commission. Congress also gave these board or commission members a role to play with respect to certain core responsibilities – such as overall approval of key staff appointments and the budget – that were likely to affect the agency's substantive functions or mission. Professor Welborn observed in his study of multi-member agencies:

Although some differences are specified in the prerogatives of chairmen and membership, ultimate formal responsibility for regulatory policy development and implementation is vested in . . . [the Board] to be exercised in a collegial, shared manner . . . .<sup>19</sup>

#### **D. The Comptroller General's Opinions**

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<sup>17</sup> *Id.*

<sup>18</sup> See Welborn, at 10, text surrounding n.18, quoting Marvin H. Bernstein, *Regulating Business by Independent Commission* (Princeton Univ. Press 1955).

<sup>19</sup> Welborn, at 5. Where Congress wants to deviate from the normal statutory division of responsibility, it knows how to do so expressly. For example, the statute governing the EEOC confers on the EEOC Chairman express power to "appoint and fix the compensation of officers and employees as *he* deems necessary." (Emphasis added.) See Decision of the Comptroller General Regarding the Equal Employment Opportunity Commission, B-167015, 1975 U.S. Comp. Gen. LEXIS 2550 at \*4 (Jan. 9, 1975).

We could not locate any judicial discussion of the relationship between the chairman of an agency and his or her colleagues.<sup>20</sup> The only significant interpretation of the respective responsibilities of the chairman of a multi-member board or commission and his fellow board or commission members is a 1974 opinion of the Comptroller General, as amended four months later, dealing with the Equal Employment Opportunity Commission (EEOC).<sup>21</sup> This opinion supports the historical evidence that Congress ordinarily intends to leave day-to-day agency administration to the Chairman while retaining for the board or commission members as a whole a role in those administrative or management matters that may affect the agency's substantive functions or mission.

The EEOC statute provides generally that "the Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission . . . ."<sup>22</sup> Although the words of individual statutes may differ somewhat, the Comptroller General observed that the EEOC's statute was analogous to provisions addressing the administrative responsibilities of heads of other independent agencies. We believe that two important general principles can be gleaned from the Comptroller General's opinion.

First, the Comptroller General approved the involvement of the commission as a whole in administrative activities:

[A] number of Commission activities, while in part administrative, also involve substantive determinations of legitimate concern to the full commission; and . . . the Commission as a body has authority to establish

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<sup>20</sup> Governance issues are not likely to get into the courts. The Department of Justice will not litigate intra-agency organizational issues on behalf of an agency (they need to be ironed out internally or under the President's or the Department of Justice's aegis) and private parties rarely, if ever, get a chance to link them to a substantive issue suitable for court review. In one rather strange case, certain private parties sued the three-member Occupational Safety and Health Review Commission to compel its Secretary to release a decision that had been signed by two members, one of whom had left the agency before the third member (the Chairman) had completed his dissenting statement. The remaining member of the majority joined in the lawsuit. In due course, following completion of the Chairman's dissenting statement, the Commission released its "2-1" decision and the court dismissed the case as moot. See *Arcadian Corporation*, OSHRC Docket No. 93-3270, 1995 OSAHRC LEXIS 106 (April 27, 1995), especially dissenting statement of Chairman Weisberg, dismissed as moot, *In Re Arcadian*, No. 95-1259, 1995 U.S. App. LEXIS 32545 (D.C. Cir. Oct. 4, 1995).

<sup>21</sup> Decision of the Comptroller General Regarding the Equal Employment Opportunity Commission, B-167015, 1974 U.S. Comp. Gen. LEXIS 1627 (Sept. 19, 1974), as amended by B-167015, 1975 U.S. Comp. Gen. LEXIS 2550 (Jan. 9, 1975). Hereafter we refer to these as the Comptroller General's 1974 and 1975 opinions.

<sup>22</sup> See Comptroller General's 1974 Opinion at \*2.

reasonable standards to delimit and govern the substantive aspects of such activities . . . .<sup>23</sup>

Second, the Comptroller General established the following general line between the functions of the Chairman and those of the Commission as a whole:

In regard to the regulatory agencies, the [Reorganization] plans distinguish between two groups of functions necessary to the conduct of these agencies. One group includes the substantive aspect of regulation – that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases. All these functions are left in the board or commission as a whole [and another] group of functions comprises the day-to-day direction and internal administration of the complex staff organizations which the commissions require. These responsibilities are transferred to the chairman of the agencies, to be discharged in accordance with policies which the commissions may establish.<sup>24</sup>

In this connection, the Comptroller General indicated that “where disputes arise as to what matters are procedural or administrative and what are substantive, the full commission should have the final say.”<sup>25</sup>

## **E. Specific Statutory Language**

Agency statutes are different and each is, to some extent, unique. Statutory deviation from the model of the Reorganization Plans ordinarily occurs when specific institutional issues are brought to Congress’ attention or are for some reason a matter of Congressional (or, more likely, Congressional staff) interest or concern. When Congress speaks explicitly, the agency members and staffs are bound by those statutory determinations. For example, the statute governing the Federal Communications Commission (FCC) unambiguously assigns key administrative responsibilities to that Commission as a whole. The FCC statute provides that the Commission:

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<sup>23</sup> Comptroller General’s 1975 Opinion at \*\*1-2.

<sup>24</sup> Comptroller General’s 1974 Opinion at \*18. As noted above, the EEOC statute deviates from the classic Reorganization Plan model and the CSB’s statute by explicitly conferring on the Chairman the authority to “appoint and fix the compensation of officers and employees as *he* deems necessary.” (Emphasis added.) See Comptroller General’s 1975 Opinion at \*\*3-5.

<sup>25</sup> Comptroller General’s 1974 Opinion at \*\*19-20.



[M]ay make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere) . . . as may be necessary for the execution of the functions vested in the Commission.<sup>26</sup>

[M]ay perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.<sup>27</sup>

[M]ay conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.<sup>28</sup>

[S]hall have authority . . . to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other employees as are necessary to the exercise of its functions.<sup>29</sup>

The FCC's statute further provides that:

From time to time as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission's principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary . . . .<sup>30</sup>

The FCC statute also has an explicit provision requiring meetings to be held:

at regular intervals, not less frequently than once each calendar month, at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases.<sup>31</sup>

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<sup>26</sup> 47 U.S.C. § 154(g)(1) (1991).

<sup>27</sup> *Id.* § 154(i).

<sup>28</sup> *Id.* § 154(j).

<sup>29</sup> *Id.* § 154(f)(1). At first blush, the appointment power in section 154(f)(1) would appear to include the power to appoint a managing director. Nevertheless, Congress goes on to provide expressly that the Commission "shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission." 47 U.S.C. § 155(e). Presumably, this additional language is intended to make clear both that the Commission must have a Managing Director and that the Commission as a whole must approve the Chairman's selection.

<sup>30</sup> 47 U.S.C. § 155(b).

<sup>31</sup> *Id.* § 155(d).

The FCC statute then sets out the Chairman's powers with some specificity. Among other functions, he has the duty to:

- preside at all meetings;
- represent the Commission in legislative matters (except that individual commissioners may always present his or her own minority or supplemental views);
- maintain contacts with other agencies; and
- coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission.<sup>32</sup>

Each of the FCC Chairman's explicit powers seems to come easily within the ordinary concept of administrative and executive authority. Taken together with those provisions that appear to accord the Commission as a whole greater than usual administrative authority, it can only be presumed that Congress intended to leave no doubt as to the express division of responsibilities between the Chairman and the Agency as a whole.

Some statutes, like the CSB's, are far less detailed. They confer specific statutory responsibilities on the Board as a whole and give the Chairperson undefined administrative and executive powers. For example, the statute governing the Federal Reserve Board provides that "the Chairman of the Board, subject to its supervision, shall be its active executive officer."<sup>33</sup> The National Labor Relations Board's statute provides simply that the President shall designate one member to serve as Chairman but otherwise has no provisions relating to the Chairman's duties.<sup>34</sup> According to the Department of Justice's Office of Legal Counsel, if an Act establishing a Commission "is silent as to an agency's internal organization, practices, and procedures . . . the clear implication is that these matters are to be decided by the members of the Commission."<sup>35</sup>

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<sup>32</sup> *Id.* § 155(a).

<sup>33</sup> 12 U.S.C. § 242 (1991).

<sup>34</sup> 29 U.S.C. § 153(a) (1991).

<sup>35</sup> Opinion of the Office of Legal Counsel, *National Commission on Neighborhoods – Powers – Appropriations*, 2 Op. O.L.C. \*366, \*367 n.5 (Sept. 8, 1977).

### III. Interpretation of the CSB's Statute

The CSB's authority arises from the Clean Air Act Amendments of 1990, codified at 42 U.S.C. § 7412(r)(6).<sup>36</sup> This enabling legislation states that “the Board shall” undertake a number of functions (i.e., conduct investigations).<sup>37</sup> The CSB statute also provides that the “Chairperson shall be the Chief Executive Officer and shall exercise the executive and administrative functions of the Board.”<sup>38</sup> Finally, the statute provides that “[t]he *Board* is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties.” (Emphasis added).<sup>39</sup> In order to resolve the issues raised by the Board Members, we must interpret this statutory language and answer the following questions:

- 1) What does the term “Board” mean and what functions are to be exercised by the full Board?
- 2) What constitute “the executive and administrative functions” to be exercised by the Chairperson?
- 3) Which of these executive and administrative functions are subject to oversight by the full Board under its authority to establish procedural and administrative rules?

#### A. Rules of Statutory Interpretation

“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used.”<sup>40</sup> In addition, the “words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to

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<sup>36</sup> Pub. L. No. 101-549, 101st Cong., 2d Sess. (1990). The final language of the statute is the product of the House-Senate Conference agreement. *See* Conference Report, 136 Cong. Rec. S18,037, 18,039 (Oct. 24, 1990) and 136 Cong. Rec. H12,848, 12,849 (Oct. 26, 1990).

<sup>37</sup> *See, e.g.*, 42 U.S.C. §§ 7412(r)(6)(C), (L), (N), and (R) (1998).

<sup>38</sup> *Id.* § 7412(r)(6)(B).

<sup>39</sup> *Id.* § 7412(r)(6)(N).

<sup>40</sup> *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897). *See also* *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989).

them.”<sup>41</sup> Thus, “[w]hen the plain meaning of statutory language is unambiguous, [and] the intent of the legislature is clear,” statutory analysis need go no further.<sup>42</sup> However, the Supreme Court has also observed that “[w]ords are inexact tools at best . . . and for that reason there is wisely no rule forbidding resort to explanatory legislative history. . . .”<sup>43</sup> Other statutes dealing with a similar topic may also be employed as an interpretive tool. In the sections below, we apply these general principles to the questions of statutory interpretation that we must address. Where the language of the statute is plain, we have applied that unambiguous meaning. Where appropriate, we have also examined the legislative history of the CSB statute and analyzed the language of similar statutes.

## **B. What does the term “Board” mean?**

The first two sections of the CSB statute provide for the creation of an “independent safety board to be known as the Chemical Safety and Hazard Investigation Board,” which consists of five members appointed by the President, by and with the advice and consent of the Senate.<sup>44</sup> *Thus, the statute begins with an explicit definition of the Board as the five presidential appointees.* Thereafter, the term “Board”<sup>45</sup> is used repeatedly in the statute to describe a number of functions that the Board “shall” or “may” take in furtherance of its mission. We have examined the use of the term each time it is mentioned in the statute. In our opinion, the plain meaning of the term “Board” is the five presidential appointees.

In other words, “Board” is used to convey the idea that the five-member Board (as a whole) *must* take some action or is *authorized* to do so at its discretion.<sup>46</sup> For example, when the statute states that the “*Board* shall . . . investigate”<sup>47</sup> or the “*Board* shall enter into a

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<sup>41</sup> *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979).

<sup>42</sup> *See District of Columbia v. Gallagher*, 97-CV-1138, 1999 WL 547874 (D.C. Cir. July 29, 1999).

<sup>43</sup> *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

<sup>44</sup> *See* 42 U.S.C. §§ 7412(r)(6)(A) and (B).

<sup>45</sup> The word “Board” is also employed a few times in the statute as part of the title of the “National Transportation Safety Board.”

<sup>46</sup> Unless the contemplated action has been delegated to the Chairperson or other member, the Board acting as a whole should take the authorized action. *See* Senate Report No. 101-228, 101st Cong., 2d Sess, 229 (1989) (“Board will operate by majority vote.”), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3613. Cited from now on as “S. Rep.” and “U.S.C.C.A.N.”

<sup>47</sup> 42 U.S.C. § 7412(r)(6)(C)(i).

memorandum of understanding,”<sup>48</sup> the statute is vesting responsibility with the full Board to take the indicated action. Of course, the full Board may delegate responsibility for many of its functions to the Chairperson who may re-delegate tasks to members of the staff under his direct or indirect supervision.<sup>49</sup> Such delegation is contemplated by the statute<sup>50</sup> and its legislative history,<sup>51</sup> is the practice at many multi-member agencies, and may be an efficient solution for discharging many of the Board’s responsibilities.<sup>52</sup>

This interpretation of the term “Board” accords with its explicit statutory definition, its plain meaning, and the pertinent legislative history.<sup>53</sup> In addition, the Department of Justice’s Office of Legal Counsel has construed the analogous term “Commission” in a similar fashion. The National Commission on Neighborhoods was established by the National Neighborhood Policy Act.<sup>54</sup> Sections 204(a) and (b) of that Act provide that “*the Commission shall undertake a comprehensive study and investigation of the factors contributing to the decline of city neighborhoods . . .*” and “[*t*]he Commission shall make recommendations for modifications in Federal, State, and local laws . . . necessary to facilitate neighborhood preservation and revitalization.”<sup>55</sup> Sections 206(b) and (d) of that Act provide that “*the Commission may procure . . . the temporary or intermittent services of experts or consultants . . .*,”[and] “[*t*]he Commission may award contracts and grants . . . .” (Emphases added).<sup>56</sup>

Section 203(c) of that Act provides that “[*t*]he Chairman shall be appointed by the President” and section 206(c) provides that each government department or agency is authorized and directed to furnish the Commission certain statistical information and data “upon request

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<sup>48</sup> *Id.* § 7412(r)(6)(E) (concerning the National Transportation Safety Board).

<sup>49</sup> *See, e.g.* 42 U.S.C. § 7412(r)(6)(L) (Board may delegate authority to individual board member to hold hearings, administer oaths, etc.). *See also* S. Rep. at 229, U.S.C.C.A.N. at 3613 (Board “may [by vote] delegate responsibilities to the chairperson or other member”).

<sup>50</sup> 42 U.S.C. § 7412(r)(6)(L) (Board may delegate authority to duly designated employees to conduct a variety of the Board’s investigative functions).

<sup>51</sup> *See* S. Rep. at 229, U.S.C.C.A.N. at 3613 (Board “may [by vote] delegate responsibilities to the chairperson”).

<sup>52</sup> Delegation of many routine functions is a practical alternative. Theoretically, the Board Members themselves could conduct all of the business of the Board. *See* Letter to Paul Hill, Jr., from R. Murphy, General Counsel, U.S. General Accounting Office (B-274245) (Jan. 16, 1997) (“Although the Board lacks an appropriation to hire staff or engage contractors . . . the Board may act directly through its members.”).

<sup>53</sup> *See id.* (“Board will operate by majority vote . . .”).

<sup>54</sup> Pub. L. No. 95-24, 91 Stat. 56 (1977).

<sup>55</sup> *Id.* at 91 Stat. 57.

<sup>56</sup> *Id.* at 91 Stat. 58-59.

made by the Chairman or Vice Chairman . . . .”<sup>57</sup> The Justice Department’s Office of Legal Counsel observed that “[e]xcept for the limited authority given to the Chairman or Vice Chairman by [section] 206(c) of the Act, all powers and duties are vested in the Commission.”<sup>58</sup>

As should be plain from the preceding discussion, we reject the possibility that Congress actually used the term “Board” in the CSB’s statute at certain points to refer to the overall institution itself, including its staff – and not just to the Presidential appointees. The available precedents do not support such an interpretation.<sup>59</sup> In addition to the reasons outlined above, such an interpretation is also contrary to a basic canon of statutory construction – that identical terms within an Act bear the same meaning.<sup>60</sup>

### C. “Executive and Administrative Functions”

The interpretation of the term “Board” does not end our analysis. The CSB statute also provides that the “Chairperson shall be the *Chief Executive Officer* of the Board and shall exercise the *executive and administrative functions of the Board*.”<sup>61</sup> (Emphases added.) The Board’s powers must be interpreted in light of the authority also conferred on the Chairperson. Because the CSB’s statute is silent on the particulars of the Chairperson’s authority, we turn to the legislative history of the CSB statute to aid our interpretation. We also rely on the traditional meaning of the phrase “executive and administrative functions” in a number of similar statutes.

The Senate Report regarding the CSB’s enabling legislation indicates that the CSB’s structure, activities, and authorities are modeled on those of the National Transportation Safety

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<sup>57</sup> *Id.* at 91 Stat. 57, 59.

<sup>58</sup> Opinion of the Office of Legal Counsel, *National Commission on Neighborhoods – Powers – Appropriations*, 2 Op. O.L.C. \*366, \*367 (Sept. 8, 1977). Unlike the CSB statute, the National Neighborhood Policy Act does not expressly name the Chairman as that agency’s chief executive officer or state that the Chairman of the Commission shall exercise the executive and administrative functions of the Commission. Thus, the powers of the CSB Board must be interpreted in light of the additional authority provided to the Chairperson of the CSB. We analyze this issue in the next section.

<sup>59</sup> *See International Paper Co. v. Federal Power Commission*, 438 F.2d 1349, 1359 (2d Cir. 1971) (agency’s employees are collectively referred to as “the staff” but they have no individual or collective authority themselves; only Presidential appointees possess statutory authority). Thus, rather than possessing its own authority, the staff exists to help the Board Members accomplish their functions. *See, e.g.* 49 C.F.R. § 800.4(a) (1998) (NTSB “staff performs duties for the Board that . . . the Board has delegated to it.”).

<sup>60</sup> *Cowart v Nicklos Drilling Co.*, 505 U.S. 469, 479 (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) and *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)).

<sup>61</sup> 42 U.S.C. §§ 7412(r)(6)(B).

Board (NTSB).<sup>62</sup> At the time the CSB legislation was enacted in 1990, the language of the NTSB statute was somewhat, although not significantly, different than it is today. At that time, the NTSB statute provided:

The Chairman shall be the chief executive and administrative officer of the Board and shall exercise the executive and administrative functions of the Board *with respect to the appointment and supervision of personnel employed by the Board; the distribution of business among such personnel and among any administrative units of the Board; and the use and expenditure of funds . . . .* The Chairman . . . shall be governed by the general policies established by the Board, including any decisions, findings, determination, rules, regulations, and formal resolutions.<sup>63</sup> (Emphasis added.)

The similarities and differences in the above NTSB language to the CSB statute and legislative history are noteworthy. The CSB statute provides that its Chairperson, like his NTSB counterpart, is the “chief executive and administrative officer of the Board” and “shall exercise the executive and administrative functions of the Board.”<sup>64</sup> But the CSB statute, unlike the NTSB’s, does not outline specific power for its Chairperson in the areas of personnel appointments or the use of appropriated funds.<sup>65</sup> The NTSB Chairman is “governed by the general policies” established by his Board.<sup>66</sup> The CSB statute provides that “the Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties.”<sup>67</sup> The CSB legislative history further adds that the CSB “chair’s conduct of the executive function is subject to oversight by the Board as a whole.”<sup>68</sup>

Based on our reading of these similarities and differences, we believe that Congress intended that the CSB Chairperson exercise the same basic executive and administrative powers as provided to the Chairman of the NTSB, and that the CSB Chairperson is subject to at least as

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<sup>62</sup> See S. Rep. at 228, U.S.C.C.A.N. at 3612.

<sup>63</sup> Pub. L. No. 93-633, § 303(b)(3), 88 Stat. 2166 (1975), reprinted in 1995 U.S.C.C.A.N. at 2517. Note that, in the tradition of the Reorganization Plans, the NTSB Chairman is given the usual three administrative powers, but subject to the Board’s general policies.

<sup>64</sup> 42 U.S.C. § 7412(r)(6)(B).

<sup>65</sup> The CSB’s legislative history explains that the “chairperson . . . is given authority for directing the work and assignments of the staff” – language that is strikingly similar to the NTSB statute authorizing the NTSB Chairman to distribute business among personnel and administrative units of the NTSB. S. Rep. at 229, U.S.C.C.A.N. at 3613. The CSB Legislative history does *not* state that the Chairperson has unfettered discretion to make personnel appointments. *Id.*

<sup>66</sup> Pub. L. No. 93-633, § 303(b)(3), 88 Stat. 2166 (1975).

<sup>67</sup> 42 U.S.C. § 7412(r)(6)(N).

<sup>68</sup> S. Rep. at 229, U.S.C.C.A.N. at 3613.

much oversight by the CSB's Board. We recognize that the CSB Chairperson's executive and administrative powers are not spelled out in the same fashion as in the NTSB statute.

Nevertheless, we see nothing in the CSB statute or legislative history that is in conflict with our interpretation. This interpretation of "executive and administrative functions" is also consistent with the manner in which this phrase has been employed in a number of reorganization plans discussed in Section II of this memorandum.<sup>69</sup> That is to say, because the Chairperson of the CSB is not limited by statutory language to the contrary, the Chairperson should exercise the standard trilogy of executive and administrative functions that we summarize as follows:

- (1) The appointment and supervision of personnel employed by the Board, except such personal staff as are assigned to an individual Board Member;
- (2) The distribution of business among such personnel and among administrative units of the Board; and
- (3) Supervision of the use and expenditure of the Board's funds.

By the same token, because the CSB Chairperson is not provided with special statutory authority which indicates that his executive powers are broader than is typical, we believe that his exercise of the executive functions are subject to the traditional limitations expressed in the Reorganization Plans (and to a certain extent reflected in the NTSB statute and the CSB statute and its legislative history). These limitations are as follows:<sup>70</sup>

- In carrying out any of his functions under the statute, the Chairperson shall be governed by general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make;<sup>71</sup>
- The appointments by the Chairperson of the heads of major administrative units under the Board shall be subject to the approval of the Board;<sup>72</sup>
- Personnel employed regularly and full time in the immediate offices of members of the Board other than the Chairperson shall not be supervised by the Chairperson;<sup>73</sup> and

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<sup>69</sup> See, e.g., Reorganization Plan No. 8 of 1950, 64 Stat. 1264 (1950) (concerning the Federal Trade Commission).

<sup>70</sup> These limitations are paraphrased from Reorganization Plan No. 8 of 1950, 64 Stat. 1264 (1950) (concerning the Federal Trade Commission).

<sup>71</sup> This language is almost identical to a similar provision in the NTSB statute quoted above.

<sup>72</sup> We discuss this issue in more detail at Section IV. B.1.



- The Board possesses the power to approve budget requests to Congress and the use and distribution of appropriated funds according to major programs and purposes.<sup>74</sup>

#### **D. Board Oversight**

Thus, the Chairperson of the CSB, like his NTSB counterpart, may be governed by the general policies established by the full Board. As discussed in Section II, Congress has not typically accorded multi-member agency chairmen absolute administrative and executive authority. Rather, Congress has usually required that, in exercising his executive powers, a chairman do so in accordance with the overall policy direction enunciated by a board as a whole. We see no deviation from this norm in the CSB's enabling statute.

Instead, the CSB statute provides that “the Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties.”<sup>75</sup> This authority to establish rules is not limited in scope so as to exclude rules governing executive and administrative functions. Indeed, the legislative history specifically states that the “chair's *conduct of the executive function* is subject to oversight by the Board as a whole.”<sup>76</sup> (Emphasis added). In our opinion, this language (and the absence of specific language governing appointments and the use of funds) permits the full Board to establish reasonable policies governing the Chairperson's exercise of his executive and administrative powers. For example, as discussed more fully below, personnel appointments by the Chairperson of the heads of major administrative units could be made subject to the approval of the full Board (see Section IV. B. 2). The full Board could also require its approval of the distribution of appropriated funds according to major programs and purposes (see Section IV. B. 3).

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<sup>73</sup> The CSB's legislative history provides that “[t]he chairperson of the Board is given authority for directing the work and assignments of the staff except that each Board member shall be assigned such personal staff as are necessary to carry out responsibilities of a member.” S. Rep. at 229, U.S.C.C.A.N. at 3613.

<sup>74</sup> We discuss these issues in detail in Sections IV.A. 4 and IV. B. 3.

<sup>75</sup> 42 U.S.C. § 7412(r)(6)(N).

<sup>76</sup> S. Rep. at 229, U.S.C.C.A.N. at 3613.

## IV. Analysis of Specific Management and Governance Areas

In this section, we analyze a number of specific management and governance areas in an effort to clarify the respective roles of the Chairperson and the Board as a whole and to limit areas of potential disagreement. We have broken this down into three subsections for organizational purposes only: principal functions of the full Board, principal functions of the Chairperson, and individual functions of the Board Members. In practice, most of these functions will ultimately be implemented in a shared fashion. For example, a number of “Board functions” (i.e., preparing investigation reports) can and should be delegated to the Chairperson and staff – with final responsibility for any resulting work product resting with the full Board. Similarly, a number of the Chairperson’s functions are subject to oversight in some form by the full Board.

### A. Principal Functions of the Full Board

#### 1. Investigations

The principal role of the new chemical safety board is to investigate accidents to determine the conditions and circumstances which led up to the event and to identify the cause or causes so that similar events might be prevented.<sup>77</sup>

The most appropriate place to begin a specific analysis of governance issues is with the Board’s principal mission: the conduct of investigations. The CSB statute states that “[t]he *Board* shall . . . investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages.”<sup>78</sup> (Emphasis added). In furtherance of such investigations, the Board, or an individual member (with the authority of the full Board), may,

(i) hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise attendance and testimony of such witnesses and the production of evidence and may require by order that any person engaged in

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<sup>77</sup> S. Rep. at 231, U.S.C.C.A.N. at 3615.

<sup>78</sup> 42 U.S.C. § 7412(r)(6)(C)(i).

the production, processing, handling, or storage of extremely hazardous substances submit written reports and responses to requests and questions within such time and in such form as the Board may require; and

(ii) upon presenting appropriate credentials and a written notice of inspection authority, enter any property where an accidental release causing a fatality, serious injury or substantial property damage has occurred and do all things therein necessary for a proper investigation pursuant to subparagraph (C) and inspect at reasonable times records, files, papers, processes, controls, and facilities and take such samples as are relevant to such investigation.<sup>79</sup>

As discussed above, the plain meaning of the term “Board” in the above-quoted language is the five-member Board acting as a whole. Put simply, this statutory language assigns responsibility for the conduct of investigations (including any hearings) to the full Board.<sup>80</sup> As in other areas, this Board responsibility should be harmonized with the statutory directive that the Chairperson exercises the executive and administrative functions of the Board. Overall policy direction by the Board in this area should not compromise the Chairman’s authority to administer the agency on a day-to-day basis and act expeditiously when necessary. The statute provides ample authority to establish an appropriate arrangement.

The most important provision of the CSB statute in this regard is section 7412(r)(6)(N), which provides, in part, that the “Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties.”<sup>81</sup> The legislative history amplifies this fundamental point. It provides, in relevant part, that the “Board is given authority to promulgate administrative rules as may be necessary to carry out its functions. These will include rules for the conduct of field investigations and hearings.”<sup>82</sup> Thus, some division of responsibility in this area that accommodates the needs of all members can be articulated in a set of investigative and hearing rules to be adopted by the full Board.

The Board has already taken several steps in this direction by commissioning an incident selection study, the writing of an investigation protocol, and by having individual Board

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<sup>79</sup> *Id.* § 7412(r)(6)(L).

<sup>80</sup> The legislative history underscores this indisputable point: “The role of members of the Board in actual accident investigations is not specified. They may, of course, be present at the scene of an accident, at evidentiary hearings and in other proceedings. The precise role that each member takes in these activities will be the prerogative of the member and will depend on his or her expertise and the division of responsibilities within the Board.” S. Rep. at 223, U.S.C.C.A.N. at 3617.

<sup>81</sup> 42 U.S.C. § 7412(r)(6)(N).

members participate as team members on particular investigations. The Board should now complete this process. The circumstances of Board involvement in a specific investigation and specific roles for individual Board members, i.e., who should decide whether to conduct a Board of Inquiry, should be spelled out in the rules authorized under subsection (N).

As it undertakes this process, the Board should be aware that delegation of investigation functions to staff is appropriate and consistent with the statute.<sup>83</sup> In addition, formal consolidation of day-to-day oversight of the investigative function in the position of the Chairperson is not only consistent with the statutory directive that he exercise such administrative authority, but is also practical. The Board cannot collectively vote on each of hundreds of issues that may arise in the course of any specific investigation. (Such an attempt at micro-management, if taken too far, might even intrude upon the Chairperson's statutory role.)

## 2. Investigation Reports

The culmination of a Board investigation will in most cases be an investigation report. The statutory language is plain: “The *Board* shall . . . investigate (or cause to be investigated), determine and *report* to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages.”<sup>84</sup> (Emphases added.) The legislative history further provides that these “reports are a statement of the Board (not staff) and are to be issued on a majority vote of the Board.”<sup>85</sup> Indeed, the legislative history also makes clear that such a majority vote on investigation reports is one of three absolutely non-delegable functions of the full Board.<sup>86</sup>

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<sup>82</sup> S. Rep. at 236, U.S.C.C.A.N. at 3620.

<sup>83</sup> See 42 U.S.C. § 7412(r)(6)(L).

<sup>84</sup> *Id.* § 7412(r)(6)(C)(i).

<sup>85</sup> S. Rep. at 234, U.S.C.C.A.N. at 3618.

<sup>86</sup> “The Board . . . may (by vote) delegate responsibilities to the chairperson or other member, except that it shall require a majority vote of the full Board to issue a report on the cause or probable cause of an accident, make a recommendation to the Administrator or the head of another Federal agency, or promulgate a rule.” S. Rep. at 229, U.S.C.C.A.N. at 3613.

### 3. Research and Studies

The CSB statute explicitly states that the “*Board* is authorized to conduct research and studies with respect to the potential for accidental releases, whether or not an accidental release has occurred, where there is evidence which indicates the presence of a potential hazard or hazards.”<sup>87</sup> (Emphasis added). Again, the plain meaning of the term “Board” is the five-member board acting as a whole. As with investigations, the final product of a study is likely to be a report.

Like other functions, the Board may vote to delegate supervision of the preparation of a particular research study to an individual Board Member (including the Chairperson) or to a member of the staff.<sup>88</sup> In our opinion, however, *issuance of a report* based on the research study without involvement or review by the Board will in most instances be inconsistent with the statutory scheme. Board members are appointed on the basis of their special technical qualifications.<sup>89</sup> Congress intended that this expertise be used, in part, to conduct research and studies as outlined in the statute. Although delegation of much of this work is appropriate and sensible, abdication of responsibility for the final result is not. It defeats the point of establishing a Board of experts to offer *its* insight. An analogy further illustrates the point: Imagine what litigants would think if a federal judge issued an opinion authored by her law clerk, with a disclaimer that “the opinion represents the views of the clerk, and not necessarily those of Judge X.”<sup>90</sup> As with investigations, hearings, and investigation reports, the Board may wish to develop rules to clarify its role in the initiation and publication of research studies.<sup>91</sup>

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<sup>87</sup> 42 U.S.C. § 7412(r)(6)(F).

<sup>88</sup> “The Board . . . may (by vote) delegate responsibilities to the chairperson or other member.” S. Rep. at 229, U.S.C.C.A.N. at 3613.

<sup>89</sup> See 42 U.S.C. § 7412(r)(6)(B) (“Members of the Board shall be appointed on the basis of technical qualification.”).

<sup>90</sup> Certainly, under the First Amendment to the United States Constitution, individual Board Members (and staff) are free to express their views on chemical safety issues. For example, government officials occasionally offer their personal views on any number of topics in op-ed pieces with a disclaimer that their views do not necessarily represent the views of their employing agency. We are, however, unaware of any examples of multi-member federal boards or commissions authorizing studies within that board or commission’s expertise and then including a disclaimer stating that the board had no involvement with the final report.

<sup>91</sup> The Board may determine that certain research reports need not receive formal Board approval. For example, the Board might authorize staff to issue a report to the public as a matter of information. Another approach might be for the Board to request that staff or a consultant make a public report *to* the Board. In other words, such rules could allow for flexibility.

#### 4. Budget Submission to Congress and OMB

The CSB statute provides, in part, as follows:

Whenever the *Board* submits or transmits any *budget* estimate, *budget* request, supplemental *budget* request, or other *budget* information . . . to the President . . . or the Director of the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress.<sup>92</sup> (Emphases added.)

The above language plainly envisions that the Board as a whole has overall responsibility for budget requests.<sup>93</sup> Accordingly, the General Counsel of the General Accounting Office opined that CSB “*Board members could directly prepare, agree on, and submit a budget to Congress on behalf of the Board.*”<sup>94</sup> (Emphases added). In addition to the specific language of the CSB statute, the Comptroller General has recognized that “budget submissions involve policy determinations” that are appropriate for consideration by the full Board.<sup>95</sup> Finally, we note that in the typical reorganization plan discussed in Section II, the power to revise budget estimates was typically left with the full Board or Commission.<sup>96</sup>

It nonetheless seems clear, as the Comptroller General’s Opinion suggests, that preparation or drafting of proposed budget documents is an administrative or executive responsibility that should initially be done by the Chairperson and staff.<sup>97</sup> Of course, the full Board could vote to amend or modify the proposed budget. In our opinion, the Board should clarify that the Chairperson and staff are responsible for the *preparation* of budget requests to Congress and OMB, but that these requests must be approved by the full Board.<sup>98</sup>

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<sup>92</sup> 42 U.S.C. § 7412(r)(6)(R).

<sup>93</sup> Such a reading of the subsection R language is consistent with the authority expressly conferred on the Board as a whole at 42 U.S.C. § 7412(r)(6)(C). There is a generic provision of federal law that discusses the obligations of the “head of an agency” with respect to the preparation of budget requests. See 31 U.S.C. § 1108(b)(1) (1998). The specific language of the CSB statute, however, which states that the *Board* submits such requests to the President and Congress, takes precedence over this general language. See *Busic v. United States*, 100 S. Ct. 1747, 1753 (1980) (specific statute will be given precedence over a more general one).

<sup>94</sup> See Letter to Paul Hill, Jr., from R. Murphy, General Counsel, U.S. General Accounting Office (B-274245) (Jan. 16, 1997).

<sup>95</sup> Comptroller General’s 1974 Opinion at \*22.

<sup>96</sup> See, e.g., Reorganization Plan No. 8 of 1950, 64 Stat. 1264 (1950) (concerning the Federal Trade Commission). See also Reorganization Plan No. 1 of 1969, 83 Stat. 859 (1969) (concerning the Interstate Commerce Commission).

<sup>97</sup> Comptroller General’s 1974 Opinion at \*\*22-23.

<sup>98</sup> A regulation from the Consumer Product Safety Commission, 16 C.F.R. § 1000.20(b) (1998), contains typical language delegating these functions to staff as follows:

## 5. Allocation of Appropriated Funds

We view this as an area of shared responsibility between the full Board and the Chairperson and discuss it in Section IV. B. 3.

## 6. Internal Organization

As with other similar statutes, the CSB statute is silent regarding its internal organization. According to the Department of Justice's Office of Legal Counsel, if an Act establishing a multi-member agency “is silent as to an agency’s internal organization . . . the clear implication is that these matters are to be decided by the members of the [board or commission.]”<sup>99</sup> For example, the NTSB enabling statute provides limited detail regarding the internal organization of that Board.<sup>100</sup> Accordingly, that Board has issued a regulation setting forth the organization of the major administrative components of the NTSB in some detail.<sup>101</sup> The full CSB board has the authority to issue a similar regulation.<sup>102</sup>

## 7. Other Functions of the Full Board

In addition to the other matters discussed above, there are a number of additional functions of the full Board which we summarize below:

- “The **Board** shall . . . issue periodic reports to the Congress, Federal, State and local agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration, concerned with the safety of chemical production, processing, handling and storage, and other interested persons recommending measures to reduce the

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The Office of the Budget is responsible for overseeing the development of the Commission’s budget. The Office [of the Budget], in consultation with other offices and directorates, *prepares, for the Commission’s approval*, the annual budget requests to Congress and the Office of Management and Budget and the operating plans for each fiscal year. *It manages the execution of the Commission’s budget.* (Emphases added.)

<sup>99</sup> Opinion of the Office of Legal Counsel, *National Commission on Neighborhoods – Powers – Appropriations*, 2 Op. O.L.C. \*366, \*367 n.5 (Sept. 8, 1977).

<sup>100</sup> See 49 U.S.C. § 1111(g)(1998).

<sup>101</sup> See 49 C.F.R. § 800.2 (1998).

<sup>102</sup> 42 U.S.C. § 7412(r)(6)(N)(1998). However, the Board as a whole could not adopt a rule that certain bureaus or offices, in the conduct of their day-to-day business, shall report to someone other than the Chairperson. See Letter to George M. Stafford from the Comptroller General, B-181536, 1974 U.S. Comp. Gen. LEXIS 1817 (July 25, 1974).

likelihood or the consequences of accidental releases and proposing corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible . . . .”<sup>103</sup>

- “The **Board** shall . . . establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the **Board**'s investigatory jurisdiction.”<sup>104</sup>
- “The **Board** shall enter into a memorandum of understanding with the National Transportation Safety Board to assure coordination of functions and to limit duplication of activities which shall designate the National Transportation Safety Board as the lead agency for the investigation of releases which are transportation related.”<sup>105</sup>
- “The **Board** shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activities.”<sup>106</sup>
- “The **Board** is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties.”<sup>107</sup>
- “The **Board** is authorized without regard to section 5 of Title 41 to enter into contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of the duties and functions of the **Board** with any other agency, institution, or person.”<sup>108</sup>
- “The **Board** shall submit an annual report to the President and to the Congress which shall include, but not be limited to, information on accidental releases which have been investigated by or reported to the **Board** during the previous year, recommendations for legislative or administrative action which the **Board** has made, the actions which have been taken by the Administrator or the Secretary of Labor or the heads of other agencies to implement such recommendations, an identification of priorities for study and investigation in the succeeding year, progress in the development of risk-reduction technologies and the response to and implementation of significant research findings on chemical safety in the public and private sector.”<sup>109</sup>

(Emphases added.)

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<sup>103</sup> 42 U.S.C. § 7412(r)(6)(C)(ii).

<sup>104</sup> *Id.* § 7412(r)(6)(C)(iii).

<sup>105</sup> *Id.* § 7412(r)(6)(E).

<sup>106</sup> *Id.* The Chairperson signed such a memorandum on behalf of the Board in 1998.

<sup>107</sup> *Id.* § 7412(r)(6)(N). At most multi-member boards, draft and final regulations are prepared by the legal staff, in consultation with the Chairman and Board Members, and presented to the Board as a whole for approval before publication in the Federal Register. *See, e.g.* 49 C.F.R. § 800.2(c) (NTSB Office of General Counsel prepares Board rules.)

<sup>108</sup> 42 U.S.C. § 7412(r)(6)(N).

<sup>109</sup> *Id.* § 7412(r)(6)(S).



## 8. Delegation of Functions and Limitations

The statute and legislative history clearly contemplate that the full Board may delegate responsibility for many of its functions to the Chairperson and through him, to the staff. For example, the statute provides that the Board may delegate its core function – investigations – to employees of the Board.<sup>110</sup> Moreover, the legislative history states, in part, that “Board . . . may (by vote) delegate responsibilities to the chairperson or other member.”<sup>111</sup>

We suggest two possible limitations on such delegations. First, in areas where there is shared authority, the Board could not vote to delegate any function of the full Board (i.e., contracting), that also falls within the scope of the Chairperson’s authority, to a Board Member other than the Chairperson. Thus, in our opinion, the Board could not delegate to a Board Member sole authority to execute contracts over the Chairperson’s objection.

Second, the legislative history states there are certain Board tasks that cannot be delegated to one Member (even the Chairperson) and that require a majority vote of the full Board.<sup>112</sup> These matters are as follows:

- 1) Issuance of a report on the cause or probable cause of an accident;
- 2) A recommendation to the Administrator of EPA or another federal agency; and
- 3) The promulgation of a rule.

### **B. Principal Functions of the Chairperson**

The Chairperson plainly plays *the* key role in agency management and administration. But certain executive or administrative responsibilities -- such as preparation of the agency’s budget, allocation of agency resources, and selection of key staff -- can have clear substantive effects, and the Board can exercise oversight of these functions.

#### 1. Appointment of Board Employees

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<sup>110</sup> See *Id.* § 7412(r)(6)(L).

<sup>111</sup> S. Rep. at 229, U.S.C.C.A.N. at 3613.

<sup>112</sup> S. Rep. at 229, U.S.C.C.A.N. at 3613.

The CSB statute is silent on this particular point. In our opinion, however, the Chairperson's statutory power to exercise the executive and administrative functions of the Board includes the authority to appoint all personnel employed by the Board (except the Board Members' own personal staff) subject to oversight by the Board as a whole. We assume for purposes of this discussion that the Board as a whole will not want to be involved in most appointments (e.g., lower-grade positions). Some Board Members, however, have already suggested that their general oversight authority provides them with some measure of input into higher-level personnel appointments.

As noted earlier, many statutes provide that the Chairman can appoint "heads of major administrative units" only with the concurrence of his colleagues.<sup>113</sup> Other statutes specifically provide that the Chairman can appoint key staff members without any involvement by Board members.<sup>114</sup> In the absence of any such explicit language in the CSB's statute, we turn to the legislative history.

The Senate Report explains that "[t]he [Chemical Safety] Board is given the power to hire staff"<sup>115</sup> while the "chairperson . . . is given authority for directing the work and assignments of the staff."<sup>116</sup> The juxtaposition of these responsibilities suggests that the Board is entitled to involvement in the hiring process. The Senate Report also expressly points out that the Chairperson's powers do not extend to the supervision of the staffs of individual Members and notes that the CSB Chairperson is subject to "oversight by the Board as a whole."<sup>117</sup> This legislative history is generally consistent with the traditional division of personnel responsibilities contained in the Reorganization Plans discussed in Section II. We believe that in light of the legislative history, much more definitive language in the Board's statute would be necessary to vest unequivocally an exclusive power of appointment in the Chairperson. Thus, certain appointments by the Chairperson could be made subject to the approval of the full Board.

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<sup>113</sup> See, e.g., the statute governing the Surface Transportation Board, 49 U.S.C. § 701(c)(2)(B) (1998).

<sup>114</sup> The statute governing the Defense Nuclear Facilities Safety Board appears to give this power to the Chairman. See 42 U.S.C. § 2286(c) (1998).

<sup>115</sup> S. Rep. at 229, U.S.C.C.A.N. at 3613.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

## 2. Supervision of Personnel

The CSB legislative history provides:

The chairperson of the Board is given authority for directing the work and assignments of the staff except that each Board member shall be assigned such personal staff as are necessary to carry out responsibilities of a member.<sup>118</sup>

Supervision of personnel is the clearest area of the Chairperson's responsibility. The statutes of most similar agencies place day-to-day supervision of personnel in the Chairman's hands. The prototype statutes expressly give the Chairman the right to distribute business among agency personnel and administrative units within the agency.<sup>119</sup> That is clearly the case here, and, in any event, no other approach is genuinely workable. The Chairperson's power includes the direction of the work of the staff on behalf of the Board and may also include the ability to initiate departures from routine or established approaches.

This interpretation of the Chairperson's role is not inconsistent with some general statutes and regulations that describe the authority of a "head of an agency" with respect to the administration of established federal personnel law.<sup>120</sup> At the same time, the Chairperson's primary role in administering personnel laws should not be interpreted to mean that the Chairperson exercises exclusive authority to establish personnel rules for the Board. Thus, the Board as a whole may still adopt general personnel rules pursuant to its authority under 42 U.S.C. § 7412(r)(6)(N).<sup>121</sup> We also see no conflict between the Board's capacity to adopt such rules and with certain personnel laws that refer to the administrative responsibilities of the "head of an agency."<sup>122</sup> In any event, certain federal personnel laws refer only to an "agency" and not

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<sup>118</sup> *Id.*

<sup>119</sup> See Reorganization Plan No. 9 of 1950, 64 Stat. 1265 (1950) (concerning the Federal Power Commission), cited in the Comptroller General's 1974 Opinion at \*\*4-5.

<sup>120</sup> For instance 5 C.F.R. § 630.101 (1998) states, in part, that the "head of an agency" is responsible for administration of that agency's leave policy.

<sup>121</sup> This is even clearer in instances in which generic federal personnel laws refer to the "agency" and not specifically to the "head of an agency." See, e.g., 5 C.F.R. § 451 (1998) (authorizing "an agency" to adopt and implement an awards program for its employees). Of course, the Board would not be authorized to adopt a policy that violated another federal law. See, e.g. 5 C.F.R. § 451.106(a) (1998) ("In establishing or operating its award program(s), an agency shall assure that a program does not conflict with or violate any other law or Governmentwide regulation.") Rather, the Board's role would be to adopt policies that *implemented* the various federal personnel laws.

<sup>122</sup> Even if there were such a conflict, the specific CSB statute authorizing the Board to make rules "necessary to the exercise of its functions and duties" would take precedence over these generic personnel authorities. See *Northern Border Pipeline Co. v. Jackson County*, 512 F. Supp. 1261, 1264 (D. Minn. 1981) (where a conflict exists between

specifically to the “head of an agency.”<sup>123</sup> In such instances, it is most clear that the Board as whole is authorized to set policy.

### 3. Use of Funds and Contracting

The statute is silent on the use and distribution of appropriated funds but vests initial contracting authority in the *Board* as a whole.<sup>124</sup> At the same time, in our opinion, supervision of the use and distribution of the Board’s funds falls within the scope of the Chairperson’s executive and administrative functions, which, in turn, is subject to oversight by the Board. In other words, there is shared authority in this area. The Board can clarify responsibilities for these functions by adopting a general policy on contracting and spending procedures.<sup>125</sup> Such a policy could include requirements for Board approval of transactions of a certain nature or amount or for the approval of the allocation of appropriated funds among the major administrative units of the Board.<sup>126</sup> This suggestion is consistent with the 1974 Opinion of the Comptroller General which addresses this precise issue in some detail.<sup>127</sup> In broad brush, the Comptroller General concluded:

The actual making of expenditures and awarding of contracts or grants are, to a large extent, administrative functions . . . [T]o consider each and every use of funds as a commission function would be inconsistent with the Chairman’s administrative authority . . . However . . . , certain grants, contracts, and other expenditures may involve matters bearing upon legitimate substantive interests and responsibilities of the full Commission . . . The full Commission has authority to establish reasonable standards to govern contracts and other uses of funds, including requirements for Commission approval of transactions of a certain nature or amount . . . The Commission’s substantive authority and responsibility as a body renders it the proper

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two statutes that apply to the same situation, the more specific statute applies over the more general one) and *Basic v. United States*, 446 U.S. 398 (1980) (specific statute will be given precedence over a more general one).

<sup>123</sup> See, e.g., 5 C.F.R. § 572.101 (1998) (authorizing *agency* to determine which positions qualify for payment of new appointees’ travel expenses to that employee’s first post of duty).

<sup>124</sup> “The *Board* is authorized to enter into contracts . . . or other transactions as may be necessary in the conduct of the duties and functions of the Board with any other agency, institution or person.” (Emphasis added.) 42 U.S.C. § 7412(r)(6)(N).

<sup>125</sup> “Absent such a policy, the Chairman is left to operate essentially in a vacuum, with the unfortunate result . . . that disputes arise on a case-by-case basis with no clear standards for their resolution. We believe that this situation is not in the best interests of the Chairman or the other [Board Members.]” Comptroller General’s 1974 Opinion at \*29.

<sup>126</sup> On the other hand, a policy that consolidated contracting functions in a member other than the Chairperson would be clearly inconsistent with the Chairperson’s executive authority. See generally Comptroller General’s 1974 Opinion and our discussion of this issue in Section IV A. 8.

<sup>127</sup> See *id.*

source for separating policy matters from administrative matters; and the Chairman's administrative authority must be considered subordinate to such Commission determinations so long as they are not patently unreasonable or excessive.<sup>128</sup>

We suggest no fixed line of demarcation between routine expenditures or contracts and those that have policy implications for the full Board. The dollar amount is not necessarily determinative. The Comptroller General recommended, and we agree, that each agency should specify which contracts and other expenditures involve substantive or policy issues that should be submitted to the full Board for consideration.<sup>129</sup>

#### 4. Spokesman for the Board.

At all Boards and Commissions (as far as we know) the Chairman is the agency's official spokesman. He represents the Board or Commission to the outside world (such as delivering testimony before Congress or communicating on the Board's behalf with other agencies) and serves as a conduit for communications from the outside world to the Board. Plainly, however, Congress intends that the views of other members of any multi-member agency be available. So other Members must be accorded an appropriate opportunity to set forth their views. How that is accomplished needs to be determined by all of the Board Members. At some agencies, the Chairman circulates a draft proposal for his colleagues' consideration. Board Members should be accorded a reasonable time to consider a Chairman's draft and, if need be, make suggestions. As a corollary, Board Members have an obligation to complete their work in a timely fashion. At some other agencies, owing to the exigencies of time, a Chairman may present the Board's testimony without pre-clearance by all of the Board Members. Clearance of testimony is a consensual process within the Board for which (to our knowledge) there are no firm guidelines.<sup>130</sup> Obviously, the Chairperson can speak with the greatest authority when he is expressing the unanimous view of the full Board on an issue.

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<sup>128</sup> *Id.* at \*\*26-27.

<sup>129</sup> *Id.* at \*\*28-29.

<sup>130</sup> At the five-member NRC, the Commission was chronically late in responding to congressional letters. So one Chairman decided that he would simply circulate proposed responses to Congress to his colleagues and consider it to be the Commission's product once he obtained two concurring votes. The remaining two members could, if they wished, later submit their differing views in separate statements.

## 5. Board Meetings

The Chairperson, by definition, presides at Board meetings. Agencies with a large workload of items to be considered typically hold meetings on a regularly scheduled basis, often weekly. Those with only occasional items for collegial discussion typically meet on an irregular basis.<sup>131</sup> Because an agency's action ordinarily depends on matters being channeled through the staff, which the Chairperson directs, Board Members favor regular meetings in order to bring up matters of interest to them that may not have surfaced. But it makes little sense to create a regular meeting schedule simply to accommodate an occasional problem. Although the Chairperson normally controls the agenda, nothing forecloses creation of a practical mechanism by which someone other than the Chairperson can place a matter on the Board's agenda. In connection with this topic, attached is a memorandum concerning quorum requirements generally. (See Attachment three).

## 6. Delegation of Functions

The full Board possesses discretion to delegate additional functions to the position of the Chairperson. As the legislative history provides, "The Board . . . may (by vote) delegate responsibilities to the chairperson."<sup>132</sup>

## **C. Functions of Individual Board Members**

Each Board Member is responsible for the core statutory functions that are assigned to the full Board. Individual Board Members must either discharge their responsibilities or delegate those functions that may be delegated. For example, the full Board is responsible for the Annual Report to be submitted to the Congress and the President. The Board may delegate responsibility for that function to the Chairperson and staff or reserve to itself a certain portion of that responsibility. In sum, we believe that there is substantial discretion for Board Members to fashion their individual duties in accordance with the general principles discussed above.

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<sup>131</sup> The Government in the Sunshine Act, 5 U.S.C. § 552b (1998), places constraints on the ability of a quorum of the agency to talk privately about substantive matters.

<sup>132</sup> S. Rep. at 229, U.S.C.C.A.N. at 3613.

## V. Conclusion

The relationship between the chairperson and his authority, and that of the members acting collegially, affects every multi-member agency to some extent. Because the chairperson's exercise of administrative and executive power can also affect the substance of a board's mission, and because statutes are often unclear or lack detail, both board chairmen and board members are understandably concerned to some extent about their respective powers. Fortunately, boards like the CSB have broad authority to fill in the gaps.<sup>133</sup> Such institutional determinations receive respect in the courts.<sup>134</sup> Most boards evolve their internal procedures and allocation of responsibilities over time.<sup>135</sup> The beginning of a board's life is an opportune time to establish a principled division of labor.

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<sup>133</sup> The Supreme Court has traditionally allowed agencies considerable procedural discretion, observing that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978), quoting *FCC v. Schreiber*, 381 U.S. 279, 289 (1965). Housekeeping details in particular, such as the scope of particular inquiries or the order in which cases will be heard and decided, are rarely disturbed by the courts. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) and *City of San Antonio v. CAB*, 374 F.2d 326 (D.C. Cir. 1967).

<sup>134</sup> See *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (1996) (upholding the SEC's creation of innovative quorum requirements).

<sup>135</sup> See *State of Idaho v. Interstate Commerce Commission*, 939 F.2d 784 (9th Cir. 1991), affirming *Union Pacific RR Co. -- Abandonment in Freemont and Teton Counties*, 6 I.C.C. 2d 641 (1990) (explaining and upholding the traditional use of the ICC's notation voting procedures).